

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that claimant's average weekly wage is no longer in dispute. Thus, the ALJ's finding of \$686.06 per week (as of 11/9/05 and including fringes) can be summarily affirmed. The parties also agreed that claimant's wage loss is 100 percent and her task loss is also 100 percent, although respondent continues to argue that claimant's work-related impairment is limited to her right upper extremity.

ISSUES

The ALJ concluded claimant sustained a whole body impairment as a result of her November 9, 2005 accident and went on to award claimant a 100 percent work disability¹ based upon the opinions of Dr. Fluter and Dr. Schulman.²

The respondent requests review of this decision and argues that claimant's impairment should be limited to her right upper extremity at the level of the forearm. Specifically, respondent maintains that claimant's psychiatric complaints are disingenuous and solely for the purpose of maximizing her award, as evidenced by the testimony of Dr. Patrick Hughes. Respondent also contends that the balance of claimant's remaining physical complaints, those to her neck, back and both shoulders, are likewise manufactured or exaggerated, or in the case of her shoulders, existed before the November 2005 accident.

Claimant argues that the ALJ's Award should be modified to reflect the fact that she is permanently and totally disabled as a result of both her physical and psychiatric conditions which arose as a result of her work-related injury. Alternatively, claimant urges the Board to affirm the ALJ's Award in its entirety.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award succinctly and accurately sets forth the facts and circumstances surrounding claimant's undisputed accident. Rather than unnecessarily restating those facts, the Board will merely adopt that statement as its own. And pursuant to the parties' stipulations at oral arguments, the Board can proceed directly to the only issue that remains in dispute, namely the nature and extent of claimant's injury, impairment and resulting disability from her November 9, 2005 accident.

¹ The ALJ did not make any findings with respect to claimant's functional impairment or whether she was permanently and totally disabled under K.S.A. 44-510c. Rather, she addressed only claimant's entitlement to permanent partial general (work) disability under K.S.A. 44-510e(a). (ALJ Award (Nov. 20, 2009) at 7).

² The ALJ also made findings with respect to claimant's average weekly wage (\$686.06) and an underpayment of temporary total disability (ttt) benefits. Those findings are no longer in dispute and are not issues on appeal.

This is no dispute amongst either the parties or the physicians that claimant sustained a significant injury to her thumb and index finger when her hand was crushed in a machine while working. The thumb on her right hand was amputated at its base and the index finger (on the same hand) was amputated at the first joint. Two physicians testified on the issue of claimant's permanent impairment to the hand.

Dr. Paul Stein, a neurosurgeon retained by respondent, examined claimant in December 2008 and after reviewing claimant's previous medical records, and taking a history from her he assigned a 50 percent permanent partial impairment to the right hand.³ Dr. Stein declined to assign any impairment to any of the other areas of claimant's body in spite of the fact that she was complaining of bilateral shoulder pain, neck and low back pain, headaches and pain in her entire arm. According to Dr. Stein's records, claimant denied any preexisting physical problems yet, in his review of the claimant's medical records, she had disclosed pre-existing bilateral shoulder complaints to Dr. Pat Do, a physician who was appointed by the ALJ to conduct an independent medical examination.

Moreover, Dr. Stein was unable to correlate many of claimant's subjective complaints with her injury. He attempted to conduct testing during the examination, but found it difficult to do so as claimant voiced subjective complaints of pain.⁴ He found no guarding or spasms in her cervical or lumbar spine. And while claimant denied preexisting shoulder problems, he concluded, based on Dr. Do's records, that claimant did in fact have such complaints before November 2005. Thus, he was unable to attribute claimant's subjective complaints to the accident at issue herein and offered no permanent impairment rating, although he did recommend further testing to the left shoulder which was apparently not done.⁵ He was likewise unable to correlate claimant's lumbar complaints to the injury and again, claimant's responses to the examination were inconsistent with her objective presentation.⁶

Dr. George Fluter, a board certified physician in physical medicine and rehabilitation was retained by claimant, also examined claimant and testified as to his impairment assessment of claimant's condition. According to Dr. Fluter, claimant sustained a far greater impairment as a result of her November 2005 accident. Dr. Fluter testified that it was his understanding that immediately after her accident, claimant sustained right

³ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

⁴ Stein Depo. at 16-17.

⁵ *Id.* at 24.

⁶ *Id.* at 25.

shoulder pain in addition to the obvious injury to her hand.⁷ He also noted present complaints (as of the time of the October 2008 examination) of pain in claimant's neck, upper back, middle back, lower back, both shoulders and in her arm and hand.⁸ Claimant reported to Dr. Flutter that her ongoing pain complaints were at a level 7 out of 10, with 10 being the most painful. She further reported that she was confined to bed with pain approximately 1 day per week.

After considering her physical examination and her complaints, he assigned ratings to her right thumb (100 percent) and index finger (80 percent) for the traumatic amputations as well as an additional 5 percent to the wrist and 2 percent to the right elbow for range of motion deficits. Dr. Flutter went on to assign 15 percent permanent impairment to the right shoulder along with 10 percent permanent impairment to the left shoulder. Finally, he assigned a 5 percent to the cervical portion of her body. When converted and combined, this yields a 44 percent whole body impairment.⁹

In addition to the physical aspect of this claim, claimant alleges that she sustained a psychological injury as a result of her traumatic injury. Given the nature of claimant's injury (two fingers were crushed in a machine and she required help to disengage the machine in order to release her hand) claimant was diagnosed initially with depression and shortly thereafter, with post traumatic stress disorder (PTSD). Both the psychological and psychiatric specialists who testified in this matter agree that claimant suffered from PTSD. However, their agreement ends there.

Dr. Robert E. Schulman, a clinical psychologist, examined claimant on August 21, 2008 and testified that claimant shows signs of both depression and PTSD, all of which he opines is attributable to her work related injury. He noted that claimant described flashbacks to the accident when exposed to triggers that remind her of the event. These triggers include shopping in the grocery store and seeing wrapped meat.¹⁰ She also has difficulty showing her right hand and often times when using her hand, she will be reminded of her accident thus increasing her anxiety. He assigned a 25 percent permanent partial impairment based upon the principles set forth in the *Guides*.¹¹ When asked if he considered whether claimant was malingering, Dr. Schulman replied that he did not, that it was not his impression that claimant was manufacturing her complaints.

⁷ Flutter Depo. at 5.

⁸ *Id.* at 6. Although Dr. Flutter originally testified that claimant told him it was her left hand that was painful, he later corrected this statement to mean the "right" hand.

⁹ *Id.* at 11-12.

¹⁰ The machine claimant was operating at the time of her accident was a meat wrapping machine.

¹¹ In the context of psychological and psychiatric injuries, the 4th edition does not provide any numerical system and as such, practitioners are referred to the 2nd edition of the *Guides*.

Dr. Schulman's diagnosis is corroborated and bolstered by the testimony of Dr. Larry Pankow, the psychiatrist who had been overseeing claimant's treatment at a local mental health facility. Dr. Pankow, testified that claimant initially began receiving treatment at the Prairie View facility in June 2006. She was originally being treated for depression, but according to Dr. Pankow, it became clear she was suffering from PTSD as well.¹²

He testified that he initially believed that claimant was going to return to work, but noted that she continued to suffer from flashbacks and "flare ups" of her PTSD. And he noted that she tried to return to work at various employers but her efforts failed. Dr. Pankow also noted the difficulty in treating claimant due to the language barrier¹³ and when treating psychiatric conditions, it is difficult to get an accurate "read" on claimant's condition as her answers were always provided by an interpreter. Claimant eventually established a treating relationship with a Spanish-speaking therapist and according to Dr. Pankow, that is helpful.

At respondent's request, claimant was also evaluated by Dr. Patrick Hughes. Dr. Hughes noted claimant presented herself in an unusual way. Dr. Hughes testified that claimant purposefully made herself shake and tremble in an unusual and unprecedented way.¹⁴ After this initial episode of shaking and trembling, claimant stopped and "went bland".¹⁵ Dr. Hughes indicated that for the rest of the interview he noted no real particular psychiatric abnormality in claimant, other than her tendency to be passive aggressive.¹⁶ He further noted that claimant's only physical complaint at this examination was to her index finger.¹⁷

Dr. Hughes concluded that as of this August 2007 visit, claimant's problems were "psychogenic in origin aimed at keeping her sanctioned as being totally disabled."¹⁸ He allowed that claimant did have PTSD following her work-related accident. But she was now cured of that, thanks to her treatment. He went on to opine that now she is, in essence, complaining to maximize her monetary result.¹⁹

¹² Pankow Depo. at 8.

¹³ Claimant does not speak English.

¹⁴ Hughes Depo. at 13.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 15.

¹⁸ *Id.* at 18.

¹⁹ *Id.* at 19.

He saw claimant again on March 23, 2009 and according to his testimony, his opinions of her condition (or lack thereof) remained the same. He maintains that claimant is cured of the PTSD although he is unable to say precisely when that occurred. He merely believes that approximately 6 weeks after her symptoms stabilized following the introduction of medications, she would have been relieved of her PTSD.

It is worth noting that Dr. Hughes was critical of Dr. Schulman's failure to conduct any sort of testing on claimant, but then conceded that he himself did not perform any tests and relied solely upon his interviews of claimant.²⁰

Claimant was also interviewed by Doug Lindahl, a vocational specialist, for purposes of creating a task list. In addition to identifying claimant's relevant work tasks,²¹ Mr. Lindahl indicated that claimant is 39 years old and attended 6 years of school in Honduras. Claimant is unable to speak or write English and is now limited in her ability to write as she is right hand dominant and lost her thumb. Mr. Lindahl testified that claimant unlikely to be able to return to substantial gainful employment.²²

The ALJ found claimant had a 100 percent permanent partial general (work) disability as a result of her work-related injury. The ALJ reasoned that:

The Administrative Law Judge is persuaded by the claimant's testimony and the medical opinions of Dr. Flutter and Dr. Schulman and concludes that claimant did sustain a whole person impairment and is entitled to an award based on a work disability. . . The Administrative Law Judge concludes that claimant is entitled to a work disability based on a 100 percent task loss and a 100 percent wage loss.²³

The Board has considered the parties arguments, their briefs as well as the evidence contained within the record and finds the ALJ's Award should be affirmed in part and modified in part. Although the ALJ found that claimant sustained a functional impairment (as assigned by Dr. Flutter) and a psychological impairment (as assigned by Dr. Schulman) she did not make any specific findings with respect to those impairments, nor did she address claimant's request for a permanent total disability finding under K.S.A. 44-510c. The ALJ merely found that claimant's impairment was not limited to just her right upper extremity but included a psychiatric injury as well. And as a result, she was entitled to a permanent partial general (work) disability.

²⁰ *Id.* at 42.

²¹ As noted earlier, the parties agreed claimant's task loss is 100 percent.

²² Lindahl Depo. at 15-16.

²³ ALJ Award (Nov. 20, 2009) at 7.

While the Board does not dispute the ALJ's ultimate finding of 100 percent work disability under K.S.A. 44-510e(a), the Board will, nonetheless, address claimant's functional impairment. Clearly there is little dispute that claimant suffered a permanent impairment to her right hand as a result of her injury. And there is little dispute between the two ratings at least as to the hand impairment. Dr. Flutter assessed 56 percent while Dr. Stein assessed 50 percent. The Board has considered the two ratings and finds that an average of the two ratings is, under these facts and circumstances, a fair assessment of the claimant's permanent impairment. Thus, the Award is modified to reflect a 53 percent permanent partial impairment to the claimant's right hand.

Claimant urged the ALJ and now the Board to consider the entire constellation of her complaints and award her a functional impairment of 44 percent to the body as a whole as assigned by Dr. Flutter. After closely reviewing Dr. Flutter's opinions and comparing them to those offered by Drs. Stein and Do, the Board is unwilling to adopt Dr. Flutter's opinions with respect to claimant's range of motion limitations, her bilateral shoulder complaints or her neck pain. The record indicates that claimant disclosed her previous symptoms in both shoulders to Dr. Do when he examined her in 2006 in connection with her request for additional treatment. It appears that claimant may well have some signs of impingement in her right shoulder and some loss of motion in both, however Dr. Do was unconvinced that these conditions had any relationship to claimant's accident. Dr. Stein holds a similar view and declined to rate claimant's shoulders. Indeed, Dr. Do also noted signs of bilateral carpal tunnel syndrome but again, he was not convinced those were causally connected to or made worse by her accident.²⁴ And as for the neck impairment, Dr. Flutter conceded that he based this rating upon the "tight bands" he found in claimant's upper back and that that condition could well have predated the 2005 accident.²⁵ Moreover, even Dr. Flutter did not find any spasms, muscle guarding or limitations in the range of motion in claimant's cervical area during his examination.

Given all of the evidence contained within the record, the Board is unpersuaded that claimant's physical permanent impairment goes beyond the right hand. However, the Board does find that claimant continues to suffer from PTSD and bears a 25 percent permanent partial impairment to the whole body as a result of that condition. Simply put, Dr. Hughes' contention that claimant is "cured" of her PTSD condition is unsupported in this record. Both Drs. Schulman and Pankow testified that claimant continues to suffer from anxiety, depression and flashbacks. She is embarrassed by her hand and the resulting deformity. Not only do her surroundings sometimes provide her with a reminder of her accident, her hand serves as a daily reminder of the accident and its aftermath. Based upon this record it is wholly understandable that claimant suffers from PTSD. And the parties acknowledged at oral argument that the only impairment rating within this record

²⁴ Do Depo. at 30.

²⁵ Flutter Depo. at 34-37.

for this condition is 25 percent. The Board finds that claimant bears a 25 percent permanent partial impairment as a result of her psychological injury which arose out of and in the course of her employment on November 9, 2005.

When the 25 percent is combined with the converted 53 percent to the hand found above, it yields a 46 percent to the whole body.²⁶ The Award is hereby modified to reflect a permanent partial impairment of 46 percent to the whole body.

Having affirmed the ALJ's conclusion that claimant's injury encompasses a whole body impairment, the next issue is the nature and extent of disability. The Board must also consider whether claimant is permanently and totally disabled.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the claimant's injury was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.²⁷

In *Wardlow*²⁸, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work. There, the Court looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

²⁶ *Id.* at 15-16.

²⁷ *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

²⁸ *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

After considering K.S.A. 44-510c and the *Wardlow* decision, the Board finds that claimant is permanently and totally disabled. Claimant suffers from a language barrier that not only inhibits her employment prospects, but as noted by Dr. Pankow, has impacted her ability to recover from this injury. She has 6th grade education from Honduras and cannot read or write English or Spanish. Although she has attempted some limited manual labor since her accident, she was unsuccessful at performing or retaining those jobs for any length of time either due to her comprehension limitations or physical complaints. Mr. Lindahl believes she is essentially unemployable given her past work history and present physical limitations. Indeed, there is nothing in this record that suggests that claimant is presently able to perform any substantial gainful employment. There are musings within the file that suggest that respondent attempted to accommodate her following the injury but that job required her to work in a cold environment, something she cannot do because of her amputation. And it would put her back in the same workplace where she was injured, something that Dr. Pankow believes would be difficult if not impossible for her to do.

In sum, the Board is persuaded that claimant's psychological and physical impairments are such that she is permanently and totally disabled under K.S.A. 44-510c. Accordingly, she is entitled to an award of \$125,000. The ALJ's Award is hereby modified to reflect this finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated November 20, 2009, is affirmed in part and modified in part as follows:

The claimant is entitled to 81.00 weeks temporary total disability compensation at the rate of \$457.40 per week or \$37,049.40 followed by permanent total disability compensation at the rate of \$457.40 per week not to exceed \$125,000.00 for a permanent total general body disability.

As of March 26, 2010 there would be due and owing to the claimant 81.00 weeks of temporary total disability compensation at the rate of \$457.40 per week in the sum of \$37,049.40 plus 147.86 weeks of permanent total disability compensation at the rate of \$457.40 per week in the sum of \$67,631.16 for a total due and owing of \$104,680.56, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$20,319.44 shall be paid at \$457.40 per week until fully paid or until further order of the Director.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of March 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Douglas D. Johnson, Attorney for Self-Insured Respondent
Nelsonna Potts Barnes, Administrative Law Judge